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DEPUTY**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY****PPL MONTANA, LLC, a Delaware limited
liability company,****Plaintiff,****v.****STATE OF MONTANA,****Defendant.****Cause No.: CDV-2004-846****FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This case was tried to the Court, sitting without a jury, in a seven-day trial beginning October 22, 2007, and ending October 30, 2007. Following the hearing, the parties were given the opportunity to file post-trial findings of fact and conclusions of law. Those have been filed, and the case has been submitted for decision. From the testimony and evidence presented, the Court makes the following:

FINDINGS OF FACT

1. Plaintiff PPL Montana, LLC (PPL Montana), is a Delaware limited liability company registered to do business in Montana. It is an unregulated wholesale generator of power. PPL Montana is a wholly owned subsidiary of PPL Corp.

2. Defendant State of Montana (State) is one of the fifty states of the

1 Union and was granted statehood on November 8, 1889.

2 3. Upon admission to the Union, the State acquired title to the beds and
3 banks of navigable waters within its borders under the Equal Footing Doctrine.

4 4. By Memorandum and Order entered August 28, 2007, the Court
5 determined that the Missouri, Madison, and Clark Fork Rivers are navigable rivers and
6 that the State acquired title to the riverbeds of those rivers upon statehood.

7 5. By separate Memorandum and Order entered August 28, 2007, the
8 Court determined that the streambeds of the rivers are part of the public land trust and
9 that the Montana Board of Land Commissioners (Land Board) has the authority to lease
10 the streambeds and use the funds for the support of public education.

11 6. PPL Montana owns and operates ten federally licensed hydroelectric
12 facilities within Montana that are at issue in this litigation: Thompson Falls (known as
13 the Thompson Falls Project) and Hebgen, Madison, Holter, Hauser, Ryan, Cochrane,
14 Morony, Rainbow, and Black Eagle (collectively known as the Missouri-Madison
15 Project).

16 7. Prior to 1999, the Thompson Falls and the Missouri-Madison
17 Projects were owned by the Montana Power Company (MPC). In 1999, PP&L Global,
18 LLC, purchased the Thompson Falls Project and the Missouri-Madison Project. It then
19 transferred those assets to PPL Montana. The closing date for the purchase was
20 December 17, 1999. As part of the purchase, PPL Montana acquired by warranty deed
21 title to certain lands owned by MPC which are associated with the hydropower projects.
22 The deeds did not include the beds of the Missouri, Madison, and Clark Fork Rivers.

23 8. PPL Montana operates the Thompson Falls and the Missouri-
24 Madison Projects and associated facilities pursuant to licenses issued by the Federal

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1 Energy Regulatory Commission (FERC) under the Federal Power Act, 16 U.S.C.
2 § 791a, *et seq.* The Thompson Falls Project is FERC Project No. 1869 and the Missouri-
3 Madison Project is FERC Project No. 2188.

4 9. PPL Montana's Thompson Falls dam is located on the Clark Fork
5 River in Sanders County, Montana. The 90-megawatt Thompson Falls Project was built
6 in 1915. The Federal Power Commission (FERC's predecessor) issued a license for the
7 Project in 1949, and FERC issued a new license on December 28, 1979.

8 10. The Missouri-Madison Project has eight hydropower dams, all of
9 which have power generation capability. The Ryan, Cochrane, Morony, Rainbow, and
10 Black Eagle dams are located on the Missouri River in Cascade County. The Holter and
11 Hauser dams are located on the Missouri River in Lewis and Clark County. The
12 ~~Madison dam is located on the Madison River in Madison County.~~

13 11. The 60-megawatt Ryan dam was completed in 1915. The
14 54-megawatt Cochrane dam was completed in 1958. The 48-megawatt Morony dam
15 was completed in 1930. The 35-megawatt Rainbow dam was completed in 1910. The
16 18-megawatt Black Eagle dam was completed in 1891. The 50-megawatt Holter dam
17 was completed in 1918. The 17-megawatt Hauser dam was completed in 1907. The
18 9-megawatt Madison dam was completed in 1906.

19 12. The Hebgen dam, part of Project 2188, is located on the Madison
20 River in Gallatin County and provides storage capability for downstream power
21 generation. It was completed in 1915.

22 13. FERC issued a new license for Project 2188 to PPL Montana on
23 September 27, 2000.

24 14. PPL Montana sells power at wholesale subject to rate regulation by
25 FERC for use in Montana and elsewhere. A portion of PPL Montana's power is sold

1 pursuant to a contract with NorthWestern Energy. PPL Montana has several generating
2 facilities other than the facilities at issue in this litigation.

3 15. The State has been aware of the presence of the Thompson Falls
4 Project and the Missouri-Madison Project since the dams were constructed.

5 16. FERC regulations require that within five years of the issuance of a
6 license, the licensee must acquire title to the land within the project boundaries or the
7 right to use the lands in perpetuity.

8 17. During the time it owned and operated the Thompson Falls and
9 Missouri-Madison Projects, MPC never applied for a lease under what is commonly
10 referred to as the Montana Hydroelectric Resources Act, Section 77-4-201, *et seq.*, MCA,
11 nor did it otherwise compensate the State for the full market value of its use of the
12 riverbeds.

13 18. Likewise, PPL Montana has not applied for a lease nor has it
14 compensated the State for its use of the riverbeds.

15 19. The Montana Department of Natural Resources and Conservation
16 (DNRC) manages the state trust lands. Until this action was initiated, neither DNRC nor
17 the Land Board had tried to determine the full market value of riverbeds used to generate
18 hydroelectric power.

19 20. The Thompson Falls Project occupies 1,992 acres. There are a total
20 of 1,089 state owned riverbed acres within the Project. Of that amount, 1,047 acres are
21 above the dam and 42 acres are below the dam.

22 21. The Hebgen dam storage project occupies 12,613 acres. The state
23 owned riverbed above the dam is 701 acres, and the state owned riverbed below the dam
24 is 12 acres.

25 22. The Madison dam project area covers 4,002 acres. The state owned

1 riverbed above the dam is 277 acres, and the state owned riverbed below the dam is 7
2 acres.

3 23. The Hauser dam project area covers 6,007 acres. There are 1,048
4 acres of state owned riverbed above the dam and 9 acres below the dam.

5 24. The Holter dam project area covers 5,578 acres. There are 1,437
6 acres of state owned riverbed above the dam and 27 acres below the dam.

7 25. The Black Eagle dam project area covers 478 acres. There are 423
8 acres of state owned riverbed above the dam and 37 acres below the dam.

9 26. The Rainbow dam project area covers 360 acres. There are 154
10 acres of state owned riverbed above the dam and 75 acres below the dam.

11 27. The Cochrane dam project area covers 203 acres. There are 154
12 ~~acres of state owned riverbed above the dam and 7 acres below the dam.~~

13 28. The Ryan dam project area covers 401 acres. There are 116 acres of
14 state owned riverbed above the dam and 43 acres below the dam.

15 29. The Morony dam project area covers 418 acres. There are 232 acres
16 of state owned riverbed above the dam and 31 acres below the dam.

17 30. The riverbeds at issue, including the riverbeds below the dams, are
18 necessary and appropriate for the operation of the projects, and they are contributing
19 factors to the value of the power sites.

20 31. The State retained John Duffield, Ph.D., an economist, to determine
21 the full market value of the riverbeds. In his analysis, Duffield utilized what is known as
22 the "shared net benefits method."

23 32. The shared net benefits method has been used primarily in
24 proceedings before FERC involving tribal lands. The Supreme Judicial Court of Maine
25 has approved the methodology in a case which did not involve tribal lands, but only state

1 lands. State v. Cent. Me. Power Co., 640 A.2d 1067 (Me. 1994).

2 33. Under the shared net benefits analysis, the net benefits are
3 determined by calculating the difference between the value of the power produced and
4 the cost of producing that power. The net benefits are then shared between the project
5 owner and the land owners. The standard share is fifty percent to the project owner and
6 fifty percent to the land owners.

7 34. In his analysis, Duffield utilized documents either produced or
8 publicly filed by PPL Montana.

9 35. Because the most recent financial information available was for the
10 first half of 2007, Duffield extrapolated that data for the full 2007 year.

11 36. A number of the documents relating to the net benefits of the
12 ~~projects which were~~ admitted into evidence are subject to the protective order entered
13 June 20, 2007.

14 37. Duffield's calculations are based on the state owned riverbeds both
15 above and below the dams.

16 38. The net benefits for the Thompson Falls Project for the years 2000
17 through 2007 are:

Year of Operation	Project Net Benefits
2000	\$9,327,893
2001	\$6,028,107
2002	\$2,318,463
2003	\$2,745,201
2004	\$3,372,527
2005	\$4,843,824
2006	\$4,247,297
2007	\$7,136,051

1 39. Including the riverbed below the dam, the State owns 54.6 percent
2 of the Thompson Falls Project area.

3 40. The State's share of the Thompson Falls Project is 27.3 percent.

4 41. The total net benefits of the Thompson Falls Project for the years
5 2000 through 2006 is \$38,521,558. Based on its 27.3 percent ownership, the total rents
6 due to the State for that period without interest is \$8,988,436.

7 42. Duffield calculated past rentals with interest at \$10,529,613.
8 Duffield used an interest rate of 4.48 percent for the past rentals, which is the actual real
9 rate of return used by the Board of Investments from 1971 through 2006.

10 43. For 2007, the rent for the Thompson Falls Project is \$1,950,592.

11 44. The total net benefits for the Missouri-Madison Project for the years
12 2000 through 2007 are:

Year of Operation	Project Net Benefits
2000	\$28,603,397
2001	\$22,711,100
2002	\$4,735,174
2003	\$9,166,791
2004	\$7,911,153
2005	\$17,278,764
2006	\$14,144,245
2007	\$17,630,706

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1 45. The percentage of state land associated with each facility in the
2 Missouri-Madison Project is:

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Name of Project	Percent
Hebgen	5.7
Madison	6.8
Hauser	17.6
Holter	26.2
Black Eagle	96.2
Rainbow	63.6
Cochrane	79.3
Ryan	39.7
Morony	62.9

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13 46. Because the Hebgen dam storage facility does not generate power,
14 Duffield allocated its benefits and costs to the downstream generating facilities.

15 47. With Hebgen allocated, the State's share of the net benefits for each
16 facility is:

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Name of Project	Percent
Madison	3.3
Hauser	8.6
Holter	12.8
Black Eagle	46.9
Rainbow	31.0
Cochrane	38.8
Ryan	19.4
Morony	30.8

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1 48. The State's share of the total net benefits for the Missouri-Madison
2 Project for the years 2000 through 2006 without interest is \$25,759,825. With interest,
3 the total rents are \$30,133,985.

4 49. For 2007, the rent for the Missouri-Madison Project is \$4,257,327.

5 50. PPL Montana retained Gary S. Saleba to determine what a fair and
6 reasonable per acre annual lease payment would be if the State is entitled to
7 compensation for use and occupation of the riverbeds. He opined that the most
8 appropriate methodology for determining a fair market value annual lease payment is the
9 methodology used by FERC to determine the amounts PPL Montana pays for using
10 federal lands at its Montana facilities under 18 C.F.R. § 11.2.

11 51. FERC sets the annual per acre charges for federal land flooded by a
12 ~~private dam based on the~~ schedule of fees for the use of linear rights-of-way prepared by
13 the United States Forest Service. Because Forest Service fees are based on linear rights-
14 of-way, FERC multiplies the Forest Service fee by two to set its per acre charges.

15 52. FERC updates its schedule of fees annually.

16 53. Because the Forest Service fees vary from county to county, the
17 annual fees PPL Montana pays for the use of federal lands in connection with its facilities
18 also vary. In 2006, the fee was \$42.16 per acre in Sanders, Gallatin, Madison, and Lewis
19 and Clark Counties, but was only \$14.02 per acre in Cascade County.

20 54. Saleba did not include the below dam acreage in his calculations.

21 55. Based on the FERC fee schedule, Saleba determined that the total
22 annual lease payments to the State for 2006 would be \$205,230.

23 56. Because Saleba did not have the 2007 FERC fee schedule, he
24 increased the 2006 fees by 2.6 percent to estimate that the total lease payments for 2007
25 would be \$210,476.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and this matter.

2. The riverbeds at issue are state school trust lands.

3. The State has a constitutional duty to obtain full market value for the use of school trust lands. MONT. CONST. art. X, §11. In administering the trust, the Land Board must "secure the largest measure of legitimate and reasonable advantage to the state." Section 77-1-202(1)(a), MCA.

4. Under Section 77-4-208, MCA, the rental for state land used for a power site "shall not be less than the full market value of the estate or interest disposed of through the granting the lease or license, such value to be carefully ascertained from all available sources."

5. The Federal Power Act does not preclude the State from seeking compensation for state trust land used in conjunction with the power sites.

6. The shared net benefits methodology relied on by the State is the most appropriate means of determining the full market value of the riverbeds.

7. The State is entitled to compensation for the acreage of the riverbeds both below and above the dams that is within the Thompson Falls and Missouri-Madison Projects' boundaries.

8. The State is not entitled to prejudgment interest.

9. The State is entitled to compensation from PPL Montana for the years 2000 through 2006 in the amount of \$34,748,261.

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1 10. The State is entitled to compensation from PPL Montana for
2 2007 in the amount of \$6,207,919.

3 11. The terms of any lease must be approved by the Land Board.
4 This includes provisions for calculating future rents.

5 12. The reasons for the Court's conclusions are set out in the
6 Memorandum of Decision entered this same date.

7 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

8 DATED this 15th day of June 2008.

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12 THOMAS C. HONZEL
District Court Judge

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15 pcs: Robert L. Sterup/Kyle Ann Gray
16 Mike McGrath/Anthony Johnstone/Jon Ellingson

17 d/TCH/PPL MT & Avista-St of MT CDV-04-346
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MONTANA FIRST JUDICIAL DISTRICT COURT

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DEPUTY

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY****PPL MONTANA, LLC, a Delaware
limited liability company,****Plaintiff,****Cause No.: CDV-2004-846****MEMORANDUM OF DECISION****v.****STATE OF MONTANA,****Defendant.**

Plaintiff PPL Montana, LLC (PPL Montana), together with Avista Corporation and PacificCorp, filed this action seeking declaratory relief on whether the State could seek compensation for the use of state owned riverbeds in their hydroelectric facilities. In response, the State filed a counterclaim containing five causes of action: declaratory relief, uncompensated use of state lands, unjust enrichment, trespass, and negligence. Avista and PacificCorp have since settled with the State.

In April 2006, the Court granted the State's motion for summary judgment on all of PPL Montana's claims, but left open the question of whether what is commonly referred to as the Montana Hydroelectric Resources Act,

1 Section 77-4-201, *et seq.*, MCA, is preempted, as applied, by the Federal Power
2 Act (FPA), 16 U.S.C. § 791a, *et seq.* The Court also entered a number of other
3 Orders which narrowed the issues to be tried.

4 The primary issues to be decided as framed by the Pretrial Order are
5 the amount of compensation the State is entitled to recover from PPL Montana for
6 its use of the riverbeds and whether the Hydroelectric Resources Act is preempted,
7 as applied, by the FPA. Other issues are the methodology that should be used to
8 determine the amount of compensation; the acreage that should be used in
9 calculating compensation; whether the State is entitled to prejudgment interest for
10 back rent; and whether the Montana Board of Land Commissioners (Land Board)
11 or the Court should determine full market value.

12 **1. Preemption As-Applied Claim**

13 Both the United States Supreme Court and the Montana Supreme
14 Court disfavor preemption of state law. Orr v. State, 2004 MT 354, ¶ 50, 324
15 Mont. 391, ¶ 50, 106 P.3d 100, ¶ 50. Consequently, in the analysis process there is
16 a "presumption against preemption." Id. The presumption "can only be overcome
17 by evidence of a 'clear and manifest' intent of Congress to preempt state law." Id.
18 (quoting Sleath v. W. Mont. Home Health Servs., 2000 MT 381, ¶ 61, 304 Mont.
19 1, ¶ 61, 16 P.3d 1042, ¶ 61).

20 In addressing whether a federal law preempts state law, including
21 common law causes of action, the Montana Supreme Court looks for evidence of
22 Congressional intent for preemption. Id., ¶ 51. The Montana Supreme Court
23 recognizes three types of preemption: express, field, and conflict. Vitullo v.
24 IBEW, Local 206, 2003 MT 219, ¶ 14, 317 Mont. 142, ¶ 14, 75 P.3d 1250, ¶ 14.

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1 First, Congress may expressly include a preemption clause
2 in the federal statute. Such an express clause would make it clear
3 that state law will not apply in the area governed by the federal
4 statute. Second, congressional intent may be implied where it is
5 reasonable to conclude that Congress intended to "occupy the
6 field" by such comprehensive regulation that there is no room for
7 supplementary state regulation. Lastly, federal law may preempt
8 state law when the state and federal law actually conflict with one
9 another. Such a conflict occurs when it is impossible to comply
10 with both the federal and state law, or because "the state law stands
11 as an obstacle to the accomplishment and execution of the full
12 purposes and objectives of Congress."

13 Orr, ¶ 51 (citations omitted) (emphasis added).

14 In its Memorandum and Order entered April 14, 2006, the Court
15 determined that the FPA neither occupies the field nor conflicts with the State's
16 claims for compensation of the state owned riverbeds under the Hydroelectric
17 Resources Act. (Mem. & Order, at 14 (Apr. 14, 2006.)) The Court did recognize
18 that Section 77-4-203, MCA, conflicts with the FPA, but "is not fatal to the State's
19 claims for compensation." (Id., at 12.) However, the Court left open the
20 possibility that the Hydroelectric Resources Act may be preempted as applied.
21 (Id., at 14.)

22 PPL Montana maintains that the Hydroelectric Resources Act is
23 preempted, as applied, contending that it is impossible for it to comply with the
24 mandates of both the FPA and the Hydroelectric Resources Act. Section 77-4-201,
25 MCA, provides that the Land Board may issue a lease for a power site. PPL
Montana argues that Section 77-4-209, MCA, limits the lease of state land for a
hydroelectric facility to fifty years, while FERC requires that within five years of
its issuance of a license a licensee must "acquire title in fee or the right to use in
perpetuity all lands, other than lands of the United States." 18 C.F.R. § 2.9, Form
L-5, "Terms and Conditions of License for Constructed Major Project Affecting

1 *Navigable Waters and Lands of the United States*,” Art. 5 (emphasis added). PPL
2 Montana also argues that the leasing process set forth in the Hydroelectric
3 Resources Act contravenes the FPA and its FERC licenses.

4 PPL Montana’s contentions are based on the implementing
5 procedures for a lease under the Hydroelectric Resources Act, not the State’s claim
6 for rental compensation. The State seeks compensation from PPL Montana
7 pursuant to Section 77-4-208, MCA, and the common law theories of
8 uncompensated use of state land, unjust enrichment, and trespass. The State’s
9 claim for compensation is found in Article X, sections 11(1) and (2), of the
10 Montana Constitution, which state:

11 (1) All lands of the state that have been or may be granted by
12 congress, or acquired by gift or grant or devise from any person or
13 corporation, shall be public lands of the state. They shall be held in
14 trust for the people, to be disposed of as hereafter provided, for the
15 respective purposes for which they have been or may be granted,
16 donated or devised.

17 (2) No such land or any estate or interest therein shall ever be
18 disposed of except in pursuance of general laws providing for such
19 disposition, or until the full market value of the estate or interest
20 disposed of, to be ascertained in such manner as may be provided by
21 law, has been paid or safely secured to the state.

22 (Emphasis added.)

23 The FPA does not preempt the State’s property rights in the riverbeds.
24 The FPA establishes a system of dual control between the states and the federal
25 government. First Iowa Hydro-Elec. Coop. v. Fed. Power Comm’n, 328 U.S.
152, 167 (1946). Under this system the federal government possesses a superior
right to regulate hydroelectric projects, including licenses for the construction,
operation, and maintenance of dams. 16 U.S.C. § 797(e). On the other hand,
“property rights are within the State.” First Iowa, at 174 (quoting Rep. William L.

1 LaFollette). A state "can dispose of the beds, or parts of them, regardless of the
2 riparian ownership of the banks. . . ." Id. Therefore, under the FPA, state property
3 rights "have not been superseded . . . [and] they remain as applicable and effective
4 as they were before its passage." Id., at 178. In addition, the FPA recognizes the
5 validity of state property rights and compensation for their use. U.S. v. Cent.
6 Stockholders' Corp., 52 F.2d 322, 332 (9th Cir. 1931) ("To put it in another way,
7 the law expressly recognizes all private rights established and determined by the
8 law of the state and expressly requires the permittee, where it interferes with such
9 rights, to compensate the owners therefor."). Accordingly, the unauthorized
10 occupation of the navigable riverbeds is compensable to the State, the owner of the
11 riverbeds.

12 Moreover, the fact that the statutes cited by PPL Montana may
13 conflict with its licenses and FERC regulations does not mean that there can be no
14 lease. Significantly, as a condition of its licenses, PPL Montana is required by
15 FERC to obtain the right to use state owned lands, but, with respect to the
16 riverbeds, it has not done so. Furthermore, the requirement that a licensee obtain
17 the right to use land in perpetuity may be modified. 18 C.F.R. § 2.9 lists numerous
18 FERC approved forms. The forms contain standard conditions to be inserted into a
19 license agreement between FERC and the licensee. Form L-5 is the form
20 applicable to PPL Montana, and the conditions set forth in L-5, specifically Article
21 5, were incorporated into PPL Montana's permits. Notably, section 2.9(a) states in
22 relevant part: "The Commission has approved several sets of standard conditions
23 for normal inclusion in preliminary permits or licenses for hydroelectric
24 developments. In a special situation, of course, the Commission in issuing a
25 permit or license for a project will modify or eliminate a particular article

1 (condition)." Such a situation occurred in Cooper Valley Elec. Assoc., Inc.,
2 4 F.E.R.C. P61, 336 (Sept. 22, 1978).

3 In Cooper Valley, the licensee petitioned FERC to revise the first
4 sentence of Article 5 of the license (the same Article PPL Montana relies on) to
5 allow the licensee to gain an interest in land that would be part of its hydroelectric
6 facility, but not in perpetuity. The lands at issue included those owned by the State
7 of Alaska, the City of Valdez, and certain native villages and regional corporations
8 under the Native Claims Settlement Act. In granting the licensee's request and
9 deleting the phrase "in perpetuity" FERC reasoned:

10 The general purpose of Article 5 is, of course, to require
11 Licensee to obtain all rights necessary or appropriate for the
12 construction, maintenance, and operation of the project. We
13 believe that Licensee's request that it be allowed to obtain these
14 rights from the State of Alaska, the City of Valdez, and various
15 native corporations for a time period less than in perpetuity is
16 reasonable. It is understandable that these entities do not wish to
17 alienate their land in perpetuity where it is not absolutely
18 necessary. . . . Thus, it should obtain rights which will last as long
19 as the lands and waters are used for project purposes.

20 Finally, the Land Board has the authority to enter into a lease under
21 Section 77-1-202, MCA. Any lease, of course, would have to comply with FERC
22 regulations.

23 2. Acreage Below the Dams

24 At issue are 290 acres of state owned riverbed located below the
25 dams. Those acres are within the boundaries of the Thompson Falls and the
Missouri-Madison Projects.

PPL Montana argues that under Section 77-4-202, MCA, which
defines a power site, the State cannot claim rent for the acreage below the dams,
while the State argues that it is entitled to compensation for those acres.

1 Section 77-4-202, MCA, provides:

2 The words "power site" as used in this part shall mean not
3 only the state-owned land on which the dam is constructed, but
4 also each separate tract of such land which will become part of the
5 reservoir and which in and of itself makes an essential contribution
6 to the value of the power site as a whole of not less than 5% of the
7 entire value of such power site.

8 (Emphasis added.)

9 It is not necessary to resort to the rules of grammar to determine
10 whether the State can be compensated for the below dam acreage, nor is it
11 necessary to determine whether the below dam acreage contributes not less than
12 five percent of the value of the dams. The State's claim for compensation is based
13 on Article X, sections 11(1) and (2), of the Montana Constitution. As noted,

14 FERC requires PPL Montana to obtain the right to use all land within the
15 boundaries of a dam project. Because the riverbeds below the dams, like the
16 riverbeds above the dams, are school trust lands, the State, as trustee of those
17 lands, is required to get full market value for the lands it leases. Montanans for
18 the Responsible Use of the Sch. Trust v. State (Montrust I), 1999 MT 263, ¶ 14,
19 296 Mont. 402, ¶ 14, 989 P.2d 800, ¶ 14. Thus, the State is entitled to
20 compensation for the acreage of the riverbeds below the dams that is within the
21 boundaries of the projects.

22 3. Prejudgment Interest

23 Section 27-1-211, MCA, provides:

24 Every person who is entitled to recover damages certain or
25 capable of being made certain by calculation and the right to
26 recover which is vested in him upon a particular day is entitled also
27 to recover interest thereon from that day except during such time
28 as the debtor is prevented by law or by the act of the creditor from
29 paying the debt.

1 Three criteria must be satisfied in order for the Court to award
2 prejudgment interest: "(1) the existence of an underlying monetary obligation;
3 (2) the amount of recovery is certain or capable of being made certain by
4 calculation; and (3) the right to recover the obligation vests on a particular day."
5 Ramsey v. Yellowstone Neurosurgical Assocs., 2005 MT 317, ¶ 19, 329 Mont.
6 489, ¶ 19, 125 P.3d 1091, ¶ 19.

7 Although PPL Montana's obligation to compensate the State for use
8 of the state owned riverbeds existed when it purchased the Thompson Falls and
9 Missouri-Madison Projects, the amount was not certain or capable of being made
10 certain by calculation at that time. Under Article X, section 11(2), of the Montana
11 Constitution, the full market value of the state lands has to be ascertained in the
12 manner provided by law. Section 77-4-208, MCA, provides that the rental is "to
13 be carefully ascertained from all available sources."

14 Neither DNRC nor the Land Board has adopted a rule as to how the
15 rent for a power site is to be set or what sources are to be considered in setting the
16 rent. Indeed, the trial centered on the appropriate methodology to be used in
17 calculating the back rent. Furthermore, although the settlements with Avista and
18 PacificCorp may have been premised on the shared net benefits methodology,
19 those settlements came well after this case was filed, and they cannot be used to
20 support an award of prejudgment interest.

21 4. Shared Net Benefits Methodology

22 The State has a constitutional duty to obtain full market value for the
23 use of school trust lands. MONT. CONST., art X, § 11(2); Montrust I, ¶ 14. The
24 full market value is to be ascertained in the manner provided by law. In
25 administering the trust, the Land Board must "secure the largest measure of

1 legitimate and reasonable advantage to the state." Section 77-1-202 (1)(a), MCA,
2 Montrust I, ¶ 14.

3 Section 77-4-208, MCA, states that the full marked value is "to be
4 carefully ascertained from all available resources." Although the supreme court
5 has never interpreted this section, the language is quite broad.

6 While the shared net benefits method has been used primarily in
7 proceedings before FERC involving tribal lands, one state court has approved the
8 methodology in a case that did not involve tribal lands but only state lands. State
9 v. Cent. Me. Power Co., 640 A.2d 1067 (Me. 1994). The Court has not been
10 cited to any case where the methodology was rejected.

11 The riverbeds have unique characteristics which make them valuable
12 ~~for the production of hydropower.~~ Since the value of the riverbeds is directly
13 related to the production of hydropower, the net benefits method best takes into
14 consideration the economic contribution the riverbeds make to that production.

15 While FERC has a fee schedule to determine annual charges for
16 federal land used in hydropower projects, that schedule does not take into
17 consideration the economic value those lands contribute to the production of
18 power. Furthermore, using that schedule simply does not establish the full market
19 value required by the Montana Constitution.

20 For these reasons, the Court concludes that the shared net benefits
21 method is the most appropriate method to meet the State's constitutional and
22 statutory mandate that it obtain the full market value for the use of state school
23 trust lands.

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1 **5. Land Board**

2 PPL Montana contends that under the Hydroelectric Resources Act,
3 the Land Board, not the Court, must decide the fair market value of the riverbeds.
4 This contention is not set out in the Pretrial Order. Indeed, PPL Montana's
5 position throughout these proceedings has been that any claim for compensation
6 under the Hydroelectric Resources Act is preempted by the FPA. As set out
7 above, the State's claim is not preempted.

8 PPL Montana also argues that the Court is precluded from
9 determining the full market value of the rent due the State because the supreme
10 court has held that it will not substitute its opinion for that of the Land Board.

11 **Montanans for Responsible Use of the Sch. Trust v. Darkenwald, 2005 MT**

12 190, ¶ 52, 328 Mont. 105, ¶ 52, 119 P.3d 27, ¶ 52. That case involved a challenge
13 to the statutory scheme for administering school trust lands and actions taken by
14 the Land Board pursuant to that scheme. This case, however, does not involve a
15 challenge to actions taken by the Land Board. Rather, the State has brought this
16 claim to obtain full market value for the use of the school trust lands as required by
17 the Montana Constitution. The State's claim is based entirely on the fact that PPL
18 Montana has occupied and continues to occupy state lands without paying rental
19 compensation. Under the Pretrial Order, the full market value of the rent due the
20 State is for the Court to decide.


21 In addition to seeking compensation for PPL Montana's past use of
22 the riverbeds, the State, in its proposed findings, asked the Court to rule that there
23 should be a lease commencing in 2007 coterminous with PPL Montana's FERC
24 licenses using the 2007 rental rate as the base amount and adjusting that amount

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1 annually by the consumer price index, with a recalculation of the base amount
2 every ten years.

3 Although a lease is required, any lease must be approved by the Land
4 Board, and the Court cannot set the terms of the lease, including provisions for
5 calculating future rents.

6 DATED this 13th day of June 2008.

7 
8 THOMAS C. HONZEL
9 District Court Judge

10 pcs: Robert L. Sterup/Kyle Ann Gray
11 Mike McGrath/Anthony Johnstone/Jon Ellingson

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13 d/TCH/PPL MT & Avista-St of MT CDV-04-846
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